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State of Utah  
DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF WATER RIGHTS

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25 March 1998

RECEIVED

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WATER RIGHTS  
SALT LAKE

William B. Parsons III  
Attorney at Law  
440 East 3300 South  
SALT LAKE CITY UT 84115

RE: Well Permit Application No. 24354 (Mun-1, p.600)

Dear Sir:

Your letter dated 13 March 1998 and captioned as above has been referred to this office for review and response. The captioned application is identified using current vernacular as "Water Right Number 85-28". The subject water right originated in Application to Appropriate Water number A24354, and was perfected under Certificate of Appropriation number 5891.

The documents attached to your letter appear to be taken from a running "log" of actions taken by the State Engineer in regards to the subject application. I am attaching herewith a photocopy of a letter issued over the signature of State Engineer Joseph M. Tracy on 27 January 1954. This letter is the rough equivalent of the "Memorandum Decision" which the present-day State Engineer would issue and summarizes most of the facts and allegations contained in the log entries. In the last paragraph on page two of the letter, it is clearly stated that: *"... Application No. 24354 is approved as of this date, subject to all prior existing rights - particularly the rights of the protestant. ..."*

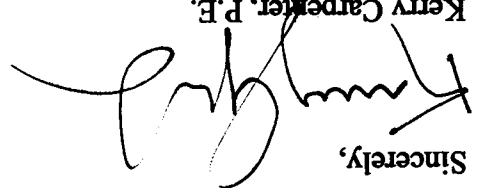
You will note that the letter of decision does not set forth nor clearly identify the rights of the protestant. At this late date, there may be some difficulty in determining exactly what those rights are - if any. Approximately 20 years subsequent to the State Engineer's decision on this application, a court-ordered General Adjudication of Water Rights was conducted in the Kanab & Johnson Creeks drainage. The resulting Proposed Determination of Water Rights was published and distributed in September of 1974. In reviewing the Proposed Determination and accompanying hydrographic survey maps, I find no indication that the "diligence rights" claimed by the protestant in the earlier matter were recognized in the adjudication. The failure of Mr. Hester or his successors to assert their rights in the adjudication has left open the question as to how those rights may be defined.

This is not to say that Mr. Hester's successors are now barred from asserting those rights. However, the process will be considerably more difficult and expensive than it would have been during the adjudication. Under Utah law, rights to the use of surface waters can be asserted on the basis of beneficial use of said waters originating prior to 1903 and continuing without significant interruption to the present. For underground waters, rights can be asserted on the basis of use originating prior to 1935. General guidance for submitting "pre-statutory" claims of this type are contained at 73-5-13 (UCA). Claim forms and detailed instructions are available in the main and regional offices of the Division of Water Rights / State Engineer.

Setting aside the issue of whether water rights for the meadow exist or can be established, in circumstances of impairment or interference between rights, the State Engineer does not have the statutory authority to unilaterally determine the extent of impairment nor to assess compensation. Typically, the aggrieved party may seek a stipulated settlement or may find it necessary to file an appropriate action in the District Court. The records of the State Engineer - and sometimes testimony of his staff - are available to the parties negotiating a settlement or to the court.

I hope that his information will be helpful to you in advising your client in this matter. If you or your client have information that could assist us in an identification or quantification of water rights appurtenant to the meadow lands in question, I would be available to review and evaluate such documents.

Sincerely,



Kerry Carpenter, P.E.  
Regional Engineer

pc: Kent Jones, P.E., Assistant State Engineer - Appropriations  
Lee Sim, P.E., Assistant State Engineer - Adjudication / Distribution  
John Mabey, Jr., Assistant Attorney General - Natural Resources  
Encl: Letter of 27 January 1954